

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

In re:

Case No. 6:05-bk-03334-ABB
Chapter 7

ALFRED KELLY CARPENTER and
JUANITA SUE CARPENTER,

Debtors.

ORDER

This matter came before the Court on various pleadings filed by Marie E. Henkel, the Chapter 7 Trustee herein ("Trustee"), and Travelers Casualty and Surety Company ("Travelers") raising objections to the claims of exemption of Alfred Kelly Carpenter and Juanita Sue Carpenter (collectively, the "Debtors"). The pleadings include: (i) the Trustee's Amended Objection to Debtors' Claim of Exemptions¹; (ii) Travelers' Amended Objection to Debtor's Claim of Exemptions (Second Amended)²; (iii) Travelers' Motion for Summary Judgment as to Cash on Hand³; and (iv) the Debtors' Motion for Summary Judgment.⁴ An evidentiary hearing was held on January 19, 2006. The parties were granted time to file post-trial briefs.⁵ After reviewing the pleadings and evidence, hearing live testimony and argument, and being otherwise fully advised in the premises, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

The Debtors filed a joint Chapter 7 bankruptcy petition on April 1, 2005 (the "Petition Date").⁶ Mr. Carpenter is a certified public accountant. He had been a principal and a major shareholder of the Kentucky accounting firm of Carpenter & Mountjoy, P.S.C. Mr. Carpenter and certain individuals entered into a Deferred Compensation Agreement⁷ with the firm dated April 1, 1996 and having an effective date of July 1, 1995.

He also executed a Shareholders Agreement dated April 1, 1996, with an effective date of July 1, 1995.⁸

Mr. Carpenter retired from his firm, which had become Carpenter, Mountjoy & Bressler, P.S.C. ("CMB"), on December 31, 1998 or January 1, 1999⁹ and sold his shares back to CMB pursuant to the terms of the Shareholders Agreement.¹⁰ His retirement entitled him to receive monthly payments of \$7,500.00 for ten years pursuant to the Deferred Compensation Agreement.¹¹ Mr. Carpenter has been receiving monthly payments pursuant to the Deferred Compensation Agreement both pre-petition and post-petition. He had received seventy-five monthly payments by the Petition Date and has received nine post-petition payments, including the December 2005 payment. He is the head of his family, providing more than one-half of the support for his family. Mr. Carpenter provides consulting services for various entities and earns income for such services.

The Trustee instituted an adversary proceeding¹² against the Debtor and the firms of CMB and Mountjoy & Bressler, LLP¹³ to recover the post-petition payments made to Mr. Carpenter pursuant to the Deferred Compensation Agreement. The Court determined in the adversary proceeding: (i) the monthly payments of the Deferred Compensation Agreement do not constitute earnings for services and do not fall within the exception of 11 U.S.C. § 541(a)(6); and (ii) the payments constitute property of the estate pursuant to § 541(a)(1) and are subject to recovery by the Trustee pursuant to 11 U.S.C. § 542(a). The Court issued a permanent injunction enjoining the accounting firms from making the Deferred Compensation Agreement monthly payments to anyone other than the Trustee or interfering with the payments in any way. The Court adopts and incorporates herein the findings of fact and conclusions of law made in the adversary proceeding.

⁸ Trustee's Exhibit No. 8.

⁹ The evidence sets forth two different retirement dates.

¹⁰ Mr. Carpenter later assigned his rights to payment for the buy-back of his stock to U.S. Bank. CMB makes payments to U.S. Bank pursuant to the buy-back provisions of the Shareholders Agreement.

¹¹ Trustee's Exhibit No. 7 at ¶1(F) p. 3.

¹² *Marie E. Henkel, Trustee, v. Alfred Kelly Carpenter, et al.*, Adv. Pro. No. 6:05-ap-00313-ABB.

¹³ CMB sold all, or virtually all, of its assets to Mountjoy & Bressler, LLP in 2004.

¹ Doc. No. 88

² Doc. No. 90.

³ Doc. No. 93.

⁴ Doc. No. 68.

⁵ Doc. Nos. 102, 103, 104.

⁶ Doc. No. 1.

⁷ Trustee's Exhibit No. 7.

Exemptions Claimed by the Debtors

The Debtors claim as exempt in their original Schedule C: (i) \$2,000 for cash on hand (having a market value of \$12,000) pursuant to Fla. Const. art. X, § 4(a)(2); (ii) \$6,885.28 (having a market value of \$6,885.28) for a Bank of America checking account pursuant to Fla. Stat. Ann. § 222.11(2)(b); (iii) \$1,004.93 for a Bank One Kentucky checking account (having a market value of \$1,004.93) pursuant to Fla. Stat. Ann. § 222.11(2)(b); (iv) \$266.52 for a Fifth Third Bank savings account (having a market value of \$266.52) pursuant to Fla. Stat. Ann. § 222.11(2)(b); and (v) a total of \$495,000.00 for four IRAs (having a total market value of \$495,000.00) pursuant to Fla. Stat. Ann. § 222.21(2).¹⁴ They claim real property located at 6851 Valhalla Way, Windermere, Florida 34786 as fully exempt pursuant to the Florida homestead exemption.¹⁵

The Debtors amended Schedule B to reflect they had \$16,000.00 in cash on hand on the Petition Date.¹⁶ They amended Schedule C to claim a 100% exemption of the \$16,000 cash on hand pursuant to Fla. Stat. Ann. § 222.11(2)(b).¹⁷ The Debtors make no mention of the Deferred Compensation Agreement in their Schedules. They apparently claim the pre-petition Deferred Compensation Agreement payments as exempt pursuant to Florida Statutes §222.11(2)(b) through exemption of their three bank accounts and cash on hand.¹⁸

Objections to Exemptions

The Trustee and Travelers, the Debtors' largest unsecured nonpriority creditor, filed objections to the Debtors' claims of exemption of the bank accounts and the cash on hand. Travelers objected to the Debtors' homestead and IRA exemption claims. The Debtors filed a Motion for Summary Judgment seeking a determination that Travelers' objection to their homestead exemption claim is untimely. Travelers' objection to the Debtors' homestead exemption was not timely filed. Travelers has withdrawn its objection to the Debtors' homestead exemption.¹⁹

The Trustee and Travelers contend the funds in the bank accounts and cash on hand are not exempt and are property of the estate because: (i) the funds are not traceable to earnings of the Debtors; and/or (ii) the funds do not constitute the disposable earnings of a head of a family; and/or (iii) the funds are not traceable to earnings received within six months of the Petition Date and deposited into a financial account. Travelers contends the IRAs are not exempt to the extent each account does not constitute a qualified retirement or profit-sharing plan, as defined by the Internal Revenue Code, and/or the Debtors converted non-exempt funds to exempt funds through the IRAs. Travelers seeks summary judgment on its objection to the Debtors' cash on hand exemption claim on the basis the cash was not deposited in any financial institution.²⁰ The Debtors conceded the funds held in the Bank One Kentucky Account in the amount of \$1,004.93 are not exempt. Such funds constitute property of the estate and must be turned over to the Trustee for administration.

Analysis

The Debtors kept cash in a lock box in their home. They had \$16,000.00 in the lock box on the Petition Date. They did not deposit the \$16,000 in a bank or financial institution account. The Debtors contend the \$16,000 cash on hand kept in the lock box constitutes money accumulated by them six months prior to the Petition Date as a result of various services performed by Mr. Carpenter. They contend the cash on hand constitutes the exempt wages of a head of household because the funds are earnings for personal services or labor. The evidence reflects the cash on hand came from a variety of sources, including payments for Mr. Carpenter's consulting activities. The cash on hand is not exempt and is property of the estate because it was not kept in a bank or financial institution account.

The payments made pursuant to the Deferred Compensation Agreement do not result from and are not attributable to Mr. Carpenter's post-employment personal services or labor. The payments do not constitute earnings for personal services or labor. The payments do not constitute wages, salary, commission, or bonus. To the extent the Debtors' bank accounts contained payments from the Deferred Compensation Agreement on the Petition Date, such amounts are not protected by Florida state law exemptions.

²⁰ Travelers' summary judgment motion is moot because a final evidentiary hearing was conducted on all issues raised in the parties' objections to exemptions.

¹⁴ Trustee's Exhibit No. 2.

¹⁵ Fla. Const. art. X, § 4(a)(1).

¹⁶ Trustee's Exhibit No. 5.

¹⁷ Trustee's Exhibit No. 6.

¹⁸ Doc. Nos. 17, 36, 37.

¹⁹ Doc. No. 87.

Bank of America, Fifth Third Bank, and Bank One Kentucky are financial institutions. The Debtors' three bank accounts with these financial institutions contained funds held by the financial institutions. The Trustee and Travelers did not establish a clear tracing of the source of funds in the Debtors' three bank accounts. Evidence presented by Mr. Carpenter reflects a substantial portion of the funds in the bank accounts came from Mr. Carpenter's consulting activities, constitute earnings from services and are exempt. The funds in the Bank of America and Fifth Third Bank accounts, in construing the facts in favor of the Debtors, are exempt. The funds totaling \$1,004.93 in the Bank One Kentucky account are not exempt and constitute property of the estate, pursuant to the Debtors' concession.

Travelers did not present evidence supporting its objection to the Debtors' claims of exemption in their four IRAs. No evidence was presented establishing that each account does not constitute a qualified retirement or profit-sharing plan, as defined by the Internal Revenue Code. No evidence was presented establishing the Debtors converted non-exempt funds to exempt funds through the IRAs. The IRAs are exempt and are not property of the estate.

CONCLUSIONS OF LAW

Debtors filing for bankruptcy protection in Florida are entitled to the Florida state law exemptions. The Florida exemptions include protection of the disposable earnings of a head of a family. Florida Statutes § 222.11(2)(b) provides:

Disposable earnings of a head of a family, which are greater than \$500.00 a week, may not be attached or garnished unless such person has agreed otherwise in writing. In no event shall the amount attached or garnished exceed the amount allowed under the Consumer Credit Protection Act, 15 U.S.C. Section 1673.

FLA. STAT. § 222.11(2)(b) (West 1998). Section 222.11(2)(b) must be read in conjunction with other provisions of § 222.11. Subsection (1)(b) defines "disposable earnings" as "that part of the earnings of any head of family remaining after the deduction from those earnings of any amounts required by law to be withheld. FLA. STAT. § 222.11(1)(b). Subsection (1)(a) defines "earnings" to include "compensation paid or payable, in money of a sum certain, for personal services or labor whether

denominated as wages, salary, commission or bonus." FLA. STAT. § 222.11(1)(a). Subsection (c) defines "head of family" to include any natural person who is providing more than one-half of the support for a child or other dependent. FLA. STAT. § 222.11(1)(c). Subsection (3) provides:

Earnings that are exempt under subsection (2) and are credited or deposited in any financial institution are exempt from attachment or garnishment for 6 months after the earnings are received by the financial institution if the funds can be traced and properly identified as earnings. Commingling of earnings with other funds does not by itself defeat the ability of a head of family to trace earnings.

FLA. STAT. § 222.11(3).

Two elements contained in § 222.11(3) must be established in order for the wage exemption of § 222.11(2)(b) to apply: The funds must be deposited into a bank account and be traced as wages. In re Lancaster, 161 B.R. 308, 309 (Bankr. S.D. Fla. 1993). The language of § 222.11(3) "is clear on its face." Id. The plain meaning doctrine must be utilized in interpreting the statute. In re McCollam, 612 So.2d 572, 579 (Fla. 1993). Section 222.11 was not intended to protect earnings from passive investments, but to protect "the fruit of one's labor for the benefit of his family." In re Stroup, 221 B.R. 537, 539 (Bankr. M.D. Fla. 1997) (quoting In re Locke, 99 B.R. 473, 474 (Bankr. M.D. Fla. 1989)). The exemption of § 222.11 only applies to bank accounts. In re Lancaster, 161 B.R. at 309.

A debtor's claim of exemption is presumptively valid. 11 U.S.C. § 522(l) ("the property claimed is exempt"); 9 COLLIER ON BANKRUPTCY ¶ 4003.04, at 4003-16 (Alan N. Resnick et al. eds., 15th ed. rev. 2005). The Trustee and Travelers, as the objecting parties, carry the burden of proving, by a preponderance of the evidence, the Florida state law exemptions claimed by the Debtors are not properly claimed. Fed. R. Bankr. Pro. 4003(c) (2005); In re Petit, 224 B.R. 834, 840 (Bankr. M.D. Fla. 1998). "[I]f the objecting party fails to produce evidence in support of the objection, any factual issue must be resolved in favor of the debtor." 9 COLLIER ON BANKRUPTCY ¶ 4003.04, at 4003-16.

Cash on Hand Exemption Claim

The Debtors' \$16,000 cash on hand on the Petition Date was an accumulation of funds from

various sources, including Mr. Carpenter's consulting income. The Trustee and Travelers did not clearly trace where the funds came from. They did not establish the funds do not constitute earnings for professional services or labor in support of their objection. Even if the Trustee or Travelers had clearly established the funds do not constitute earnings for professional services or labor, the funds are not protected. The funds were not held in a bank or financial institution account. The Debtors admitted they did not deposit the \$16,000 cash on hand into a bank or financial institution account; it was kept in a lock box in their home. The first prong of § 222.11(3) for exemption of the cash on hand pursuant to § 222.11(2)(b) has not been met. The Debtors' cash on hand in the amount of \$16,000 is not entitled to exemption and constitutes property of the estate pursuant to 11 U.S.C. § 541(a). The Trustee is entitled to turnover of said sum pursuant to 11 U.S.C. § 542(a).

Bank Account Exemption Claims

The payments made pursuant to the Deferred Compensation Agreement do not constitute earnings for services as that term is used in 11 U.S.C. § 541(a)(6). An exemption protection for earnings pursuant to Florida Statutes § 222.11(2)(b) only exists where the earnings arise from "personal services or labor." Fla. Stat. § 222.11(1)(a). The payments made pursuant to the Deferred Compensation Agreement do not result from and are not attributable to Mr. Carpenter's post-employment personal services or labor. The payments do not constitute wages, salary, commission, or bonus. The Deferred Compensation Agreement payments do not constitute exempt earnings pursuant to Florida Statutes § 222.11(2)(b).

Any funds constituting Deferred Compensation Agreement payments contained in the Debtors' Bank of America, Bank One Kentucky, and Fifth Third Bank accounts²¹ on the Petition Date are not exempt pursuant to Florida Statutes § 222.11(2)(b). The funds in these three accounts were held in financial institution accounts. The first prong of § 222.11(3) has been met since the funds were held by banks. The Trustee and Travelers have not clearly traced where the funds in these accounts came from. A substantial portion of the funds were compensation for Mr. Carpenter's consulting activities. The Court is compelled to resolve all

factual issues in favor of the Debtors. The Trustee and Travelers have not carried their burden of proof in establishing the source of the funds. The Debtors' claims of exemption in the Bank of America and Fifth Third Bank accounts are due to be allowed.

IRA and Homestead Exemption Claims

Travelers has failed to establish the Debtors' claims of exemption of their four IRAs are improper. The Debtors' claims of exemption of the four IRAs are proper pursuant to Florida Statutes § 222.21(2) and are due to be allowed. Travelers withdrew its objection to the Debtors' homestead exemption. The Debtors' homestead exemption claim pursuant to Fla. Const. art. X, § 4(a)(2) is due to be allowed.

A separate judgment consistent with these Findings of Fact and Conclusions of Law shall be entered contemporaneously.

Dated this 30th day of March, 2006.

/s/ Arthur B. Briskman

ARTHUR B. BRISKMAN
United States Bankruptcy Judge

²¹ The Debtors have conceded the funds in the Fifth Third Bank account are not exempt and constitute property of the estate.